IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 231

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, AFL-CIO,

Petitioner,

v.

ARIADNE SHIPPING COMPANY, LIMITED, a Liberian corporation, and EVANGELINE STEAMSHIP COMPANY, S. A., a Panamanian corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Florida District Court of Appeal, Third District, affirming the judgment of permanent injunction, is reported at 215 So. 2d 51 (A. 49a-54a).[1] The opinion of the same Court affirming a temporary restraining order is reported at 195 So. 2d 238 (A. 48a).

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[1] The Supreme Court of Florida denied, without opinion, a petition for certiorari to review the decision of the District Court of Appeal (A. 55a-56a). The order under review herein is that of the District Court of Appeal affirming the permanent injunction. *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U. S. 746.

Jurisdiction

The order of the Supreme Court of Florida denying certiorari was entered on March 19, 1969. The order of the District Court of Appeal was entered on October 29, 1968. The petition for a writ of certiorari was filed in this Court on June 13, 1969, and was granted on October 13, 1969.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The relevant Constitutional provisions are:

Article VI, 2nd Paragraph (Supremacy Clause);

First and Fourteenth Amendments;

The relevant statutory provisions are:

National Labor Relations Act, §§ 7, 8(b)(1), (2), (4) and (7) and 9(a) and (b); 29 U. S. C. §§ 157, 158(b)(1), (2), (4), and (7), and 159(a) and (b).

The text of these provisions is set forth in the Appendix to this brief (*infra*, pp. 39-45).

Questions Presented

1. Whether the National Labor Relations Act preempts state jurisdiction to enjoin peaceful picketing by a longshore union protesting the payment of substandard wages to non-union workers employed to load a foreign flag vessel in an American port.

2. Whether the issuance of an injunction against peaceful picketing publicizing substandard wages violates peti-

tioner's rights under the First and Fourteenth Amendments to the United States Constitution, where there is neither evidence, finding, nor other form of judicial articulation of any illegal objective under state or federal law.

STATEMENT

The Facts

Respondents operate at least two vessels under foreign registry on Caribbean cruises originating in Miami and Fort Lauderdale, Florida. Local 1416, an affiliate of the International Longshoremen's Association, AFL-CIO, represents longshoremen in the Miami-Fort Lauderdale area.

The ordinary longshore work of loading and stowing ship's cargo and ship's stores, loading and unloading passengers' baggage, and loading automobiles aboard respondents' vessels was performed, in these Florida ports, not by union longshoremen but partly by ship's employees and partly by outside personnel hired locally for the occasion. Their wages were below the area standards established in local ILA agreements. Accordingly, on days when these longshore operations took place, Local 1416 posted a picket on the dock in front of the ship protesting the payment of substandard wages to personnel performing longshore functions. On days when no loading occurred, no picketing took place (A. 44a-45a).

On at least one occasion the union also displayed a sign calling attention to unsafe shipboard conditions, dangerous to passengers and employees.[2]

[2] Although the trial judge enjoined these "safety" signs, he specifically declined to find them false and, indeed, assumed their truth as a matter within his judicial notice (A. 32a). No factual evidence on this issue was ever presented by either side. The trial judge apparently viewed the charges of unsafe shipboard condi-

The Litigation

Upon service of the complaint and request for a temporary restraining order, the union filed a motion to dismiss for lack of jurisdiction, asserting that the issues raised by respondent fell within the exclusive jurisdiction of the National Labor Relations Board (A. 12a-13a). A companion motion to dismiss was filed on the ground that the activities complained of were protected by the First and Fourteenth Amendments (A. 14a).

The only hearing held at any stage of this litigation took place upon the return of the application for a temporary restraining order. Respondents, though plaintiffs and moving parties, adduced no evidence whatsoever. Petitioner called two witnesses, one of whom attempted to testify on the truthfulness of the "safety" signs but was balked by objections successfully interposed (A. 31a). The other witness testified to the message contained on the area standards picket sign, the occasions when and place where it was displayed, and the nature of the protested work being performed at substandard wages (A. 44a-45a). His testimony, consuming approximately two pages of the record, constitutes the entire evidence in this case on the issues here under review.

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tions, though true, as beyond the legitimate interests of a labor union and therefore unjustified, enjoinable interference with respondents' business. Between the issuance of the temporary restraining order and the permanent injunction, the federal authorities imposed stricter safety requirements on foreign flag passenger vessels using American ports, and the union thereupon abandoned its appeal from this branch of the injunction. Notwithstanding such express abandonment, the District Court of Appeal inexplicably held this decretal provision to be justified in order "to counter . . . appellant's false accusations regarding the unsafeness of the ships." In any event, petitioner regards this issue as abandoned, and has not sought review of those provisions of the injunction in this Court.

At the hearing on the application for temporary injunctive relief, petitioner's counsel reiterated the union's contention that the preemption doctrine applied to picketing directed at the payment of substandard wages for longshore work. The trial court accepted the company's argument that the decisions in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 and *Incres Steamship Co., Ltd.* v. *IMWU*, 372 U.S. 24, deprived the NLRB of jurisdiction over longshore operations performed on foreign flag vessels in American ports, and not merely disputes involving the labor relations of the ship's crew (A. 27a-29a; 32a-40a; 46a).

At the hearing, union counsel also urged the applicability of the Constitutional guarantees of free speech, noting that the companies had not ascribed any illegal or prohibited purpose to the area standards picketing and had not presented any evidence on this point (A. 29a-30a). In his words "They have not said this picketing is for any purpose. . . . They are only saying they are losing business because of it." He expressly disclaimed any union purpose to replace the existing personnel with union members and emphasized the absence of any evidence to the contrary (A. 30a; 39a). Company counsel argued merely that respondents have "a lawful right to conduct our business in a lawful manner. We, under the laws, may not have that lawful right interfered with." (A. 42a).

At the conclusion of the hearing, the court concluded "that the National Labor Relations Board has no jurisdiction in this cause, that there is no labor dispute; and that this Court has jurisdiction. . . ." It also concluded "that the acts of the union are in violation of Florida law [without specifying what law or by virtue of what illegal means or prohibited purpose]; and that the picketing would not be an enjoining of free speech as guaranteed by the Constitu-

tion of the United States" (A. 46a; 16a). The decretal provisions of its restraining order enjoined:

> "3.—Picketing or patrolling with signs or placards indicating or inferring that a labor dispute exists between Defendant and Plaintiffs, by any statement, legend or language alleging Plaintiffs pay their employees substandard wages;"
>
> "4.—By any manner or by any means, including picketing or the distribution of handbills, inducing or attempting to induce customers and potential customers of Plaintiffs to cease doing business with Plaintiffs." (A. 16a).

The union took an interlocutory appeal to the District Court of Appeal on the issue of jurisdiction, again urging the preemptive force of the federal labor laws. The temporary restraining order was affirmed *per curiam* on the authority of *Sociedad Nacional* and *Incres* (A. 48a).[3]

The union then filed its answer in the trial court, alleging, among other defenses, the exclusive jurisdiction of the NLRB and the free speech guarantees of the Federal Constitution (A. 18a-19a; 25a). Without adducing further proof, the company moved for summary judgment making the temporary injunction permanent; and this motion was granted by the trial court (A. 47a).

Both federal contentions were also pressed on appeal. The District Court of Appeal acknowledged that the testimony at the hearing on the temporary restraining order—the only hearing had in the case—"tended to show . . . that

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[3] The single state court case cited by the District Court of Appeal dealt with the union's alternative contention that the companies had failed to qualify under Florida law and thus lacked standing to sue in the Florida courts.

the union was attempting to inform the public that the American residents who were working on the cruise ships were being paid substandard wages". Holding that state jurisdiction was not preempted, the District Court of Appeal concluded that the injunction properly "embodied the court's finding that no real dispute over wages really existed, and therefore, publicizing accusations as to that grievance was also forbidden" (A. 52a-53a).[4]

The union then petitioned the Supreme Court of Florida for a writ of certiorari to review the decision of the District Court of Appeal, again urging the applicability of the preemption doctrine and free speech guarantee. Under Florida law, the State Supreme Court has jurisdiction over this type of case only to resolve conflict between two District Courts of Appeal or between the decision sought to be reviewed and decisions of the State Supreme Court. Consti-

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[4] Neither the opinion of the District Court of Appeal nor any order of the trial court explains the District Court of Appeal's comment that no "real" dispute over wages "really" existed. The trial court had concluded that there was no "labor dispute" and enjoined picket signs indicating that a "labor dispute exists between Defendant and Plaintiff by any reference to substandard wages." But there was neither evidence nor finding of a lack of "real" dispute: The message of the area standards picket sign was not attacked as, or held to be, factually untrue, nor was its professed objective shown, or held, to mask some other non-labor objective unrelated to wage scales. The trial court's statement as to the lack of a "labor dispute" would appear to be merely a conclusory capsulizing of one of the following legal theories: (1) a "labor dispute" is a dispute within the jurisdiction of the NLRB, and since this dispute is not within NLRB jurisdiction, it is not a "labor dispute"; or (2) inasmuch as Local 1416 did not represent any of the longshore employees of respondents, no "labor dispute" existed between the parties. That the District Court of Appeal probably had in mind the latter theory appears from its earlier recital "that none of the members in the appellant labor union are employed to perform any work in connection with the operation of the cruise ships involved herein; moreover, the union itself does not represent any of the employees who work on the ships" (A. 50a-53a).

tution of the State of Florida, Article V, Section 4(2); Florida Appellate Rules 4.5 c(6). Over the dissent of two Judges, the Supreme Court of Florida denied the petition for certiorari, "it appearing to the Court that it is without jurisdiction" (A. 55a).

Summary of Argument

I.

The exclusive jurisdiction of the National Labor Relations Board preempts state power to enjoin peaceful picketing in a dispute over longshore wage rates. Area standards picketing directed at preserving the union's established wage levels is protected activity under the Act. If, however, the professed objective were found to mask a secondary purpose or a coercive thrust at employees' free choice of bargaining representative, then the picketing would be arguably prohibited by the Act. In either event, the issue is exclusively for the Labor Board to determine. *San Diego Building Trades Council* v. *Garman*, 359 U.S. 236.

The Florida courts errroneously considered this case governed by the decisions in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138; *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10; and *Incres Steamship Co., Inc.* v. *IMWU*, 372 U.S. 24. Those cases involved labor disputes between vessel and crew, and the Court's ruling that the Labor Board is without jurisdiction over "maritime operations" of sailors engaged in "operating ships" has no application to a dispute over longshore operations in American ports only.

None of the considerations underlying *Benz*, *Sociedad Nacional*, and *Incres* apply here. Since a ship and its crew sail throughout the world, NLRB regulation of the continuing labor relations between vessel and seamen would

have had major extraterritorial effects. Longshore operations, on the other hand, take place wholly within the geographical confines of a port, and Labor Board jurisdiction over American longshore operations is not extraterritorial.

For similar reasons, Board jurisdiction over the longshore disputes of foreign vessels does not conflict with the laws or administrative orders of the flag nation. These laws regulate shipboard labor relations only, and do not purport to govern longshore operations in ports of other countries. The danger of conflicting union certifications or bargaining obligations, so pronounced in *Benz, Sociedad Nacional and Incres,* does not exist here. Nor is there risk that foreign flag vessels will transfer their registry and remove themselves from American control in time of national emergency, merely because they may be required to pay American longshore rates for American longshore work.

The principle of comity embodied in the "law of the flag", also relied upon in *Benz* and *Sociedad Nacional,* applies only to the "internal affairs" or "internal discipline" of a ship. Longshore operations are performed on shore as well as on ship, usually by local employees, and have thus never been regarded as part of the internal affairs or discipline of the ship. Accordingly, neither international custom nor international treaties assuring the flag nation primary authority over a ship's internal affairs have any relevance. In other legal contexts, too, the distinction between longshore and maritime operations is well recognized. For example, foreign shipowners must cover their American shore-based employees, including longshoremen, under United States social welfare legislation, although foreign crew members are expressly excluded from such coverage.

The same distinction between seaboard and longshore operations has been applied under the National Labor Re-

lations Act. Most longshore work in this country is performed for foreign shipping lines, and Labor Board representation certifications have uniformly included all longshore employers, both foreign flag and domestic. The Board has also consistently taken cognizance of unfair labor practice charges arising out of the longshore disputes of foreign flag vessels, and its jurisdiction to do so has been confirmed by the courts.

The Board's preemptive jurisdiction is not affected by the fact that a portion of respondents' longshore work was done by members of the crew. The very fact that a portion of this work was also performed by local American residents confirms the need for exclusive decisional power in a single federal tribunal, statutorily qualified to assess the implications and significance of a longshore work force consisting of both foreign and American residents. But beyond this, the Board would have jurisdiction even if all the longshore work were done by ship's crew. For only seaboard labor relations are excluded from Board regulation. When the seaman no longer acts as such, but performs domestic, longshore work, with substantial shore-based contacts, the principle of *Benz* and *Sociedad Nacional* no longer holds. Any other result would permit crew members to perform numerous shoreside tasks in disregard of the traditional trade classifications of American labor, without any power in the Labor Board to assume jurisdiction of the disruptive labor disputes which would inevitably ensue. Such a totally unwarranted abnegation of usual territorial jurisdiction would frustrate the declared policy of the Act and is consonant neither with the provisions of the statute nor the controlling case-law.

Moreover, the rationale of the courts below would undermine and disrupt labor relations in the sensitive, complex longshore industry. Longshore collective agreements cover

foreign and domestic lines alike, since a longshoreman's work is performed interchangeably for both types of employer. The fragmentation of a heretofore unitary labor relationship, with a minor segment regulated by the national Labor Board and the major portion subject only to the diverse laws and determinations of the several states, would have potentially disastrous implications.

II.

Peaceful picketing which publicizes an employer's failure to pay prevailing wage rates is Constitutionally protected under the First and Fourteenth Amendments. Recognizing, however, that picketing is "free speech plus" the Court has upheld state injunctive power where the picketing has an objective prohibited by valid state policy.

The Court has insisted, however, that the state policy be defined and articulated by the state legislature or court, so that its consonance with First Amendment standards may be reviewed. The Court has also held that the evidence must show that the picketing was in fact for the proscribed purpose.

Here respondents produced no evidence at all, and the record gives no indication that the union purpose was anything other than that proclaimed on the picket sign itself: the publicizing of substandard wages. Nor did the Florida courts make any factual findings, ascribe to the picketing any particular objective, let alone an illegal one, or enunciate any state policy which the picketing may have contravened. The publicizing of substandard employment conditions is the main purpose of Constitutionally protected picketing, and this protection is not lost merely because the picketing union does not represent the company's employees. Accordingly, the injunction herein abridges petitioner's right to free speech and should not be allowed to stand.

ARGUMENT

I.

The National Labor Relations Act Preempts State Jurisdiction To Enjoin Peaceful Picketing in a Dispute Over the Wage Rates to Be Paid Employees Performing Longshore Work on Foreign Flag Vessels in American Ports.

Apart from the fact that respondents' vessels operate under foreign flags, there could not be even a colorable challenge to the exclusive preemptive jurisdiction of the National Labor Relations Board.

Peaceful primary picketing to protest wage rates below established area standards constitutes protected activity under Section 7 of the National Labor Relations Act. *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62; *Steelworkers* v. *NLRB*, 376 U.S. 492, 498-499; *Youndahl* v. *Rainfair*, 355 U.S. 131, 139; *Garner* v. *Teamsters*, 346 U.S. 485, 500. If, on the other hand, on a factual record totally different from this one, the Labor Board concluded that the picketing had secondary objectives or coercive designs upon the free selection of employee representative, then it might well find the union activity prohibited under Sections 8(b)(4) or 8(b)(7) of the Act. E.g. *International Hod Carriers Local 41 (Calumet Construction Co.)*, 130 NLRB 78, rev'd, 133 NLRB 512; *Retail Clerks Local 344 (Alton Myers)*, 136 NLRB 1270; *Local 953 IBEW (Erickson Electric Co.)*, 154 NLRB 1301; *Retail Clerks Local 899 (Ted R. Frame)*, 166 NLRB No. 92; Note, "Illegal Picketing Under Section 8(b)(7)—A Reexamination", 68 Columbia L. Rev. 745.

But whether the activity be arguably protected or prohibited, state injunctive jurisdiction is clearly preempted. *Garner* v. *Teamsters*, 346 U.S. 485; *San Diego Building*

Trades Council v. *Garmon*, 359 U.S. 236; *Liner* v. *Jafco, Inc.*, 375 U.S. 301; *National Marine Engineers Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173; *Hanna Mining Company* v. *District 2, MEBA*, 382 U.S. 181. And preemption applies whether or not the pickets and the business being picketed occupy a proximate employer-employee relationship. *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270; *Retail Clerks, Local 560* v. *F. J. Newberry Co.*, 352 U.S. 987; *Pocatello Building & Construction Trades Council* v. *C. H. Elle Cont. Co.*, 352 U.S. 884. Moreover, a state court may not avoid the preemptive force of the NLRA by generalizing that no "labor dispute" exists between the parties or characterizing the dispute as not "bona fide". *Liner* v. *Jafco., Inc., supra*, 375 U.S. 301; *Local 438, Construction Workers* v. *Curry*, 371 U.S. 542.

In holding the National Labor Relations Board to be totally without jurisdiction of this controversy over longshore wage rates, the Florida courts relied upon three decisions of this Court dealing exclusively with the maritime, seaboard labor relations between a vessel and its crew. Although the Labor Board, with uniform judicial approval, has consistently assumed jurisdiction over the American longshore labor disputes of foreign flag vessels (*infra*, pp. 28-30), and although foreign vessels account for the overwhelming bulk of longshore work in American ports, this is the only case, to our knowledge, in which any court has denied the applicability of the federal labor laws to these American longshore operations.

We submit that the Florida courts have totally misread the Court's decisions which they erroneously considered controlling. Neither the holdings nor underlying rationale of these cases permit their narrow ruling, fashioned for the unique shipboard relations between vessel and crew, to be extended to the vastly different longshore operation of load-

ing and discharging cargo, baggage and ships stores, wholly within the territorial confines of an American port.

A. The Decisions in *Benz*, *Sociedad Nacional* and *Incres*.

The first of the triumvirate of decisions relied upon below was *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138. A foreign flag vessel temporarily in an American port was picketed by an American seagoing union in support of the economic demands of an exclusively foreign crew. The purpose was to compel the employment of striking crew members upon more favorable terms than were contained in their shipping articles, made in a foreign port under foreign law at the commencement of the voyage. Observing that United States administrative regulation of the contractual labor arrangements made abroad under foreign law would plunge the courts and the Labor Board into "a delicate field of international relations", the Court concluded: "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S., at 143.

The problem of interference with foreign legal relationships and regulatory programs was posed even more directly in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10. In that case the Board had ordered a representation election among the foreign crew members of a Honduran flag vessel upon the petition of an American seamen's union. The crew was then represented by a Honduran union certified under the Honduran labor laws. Under these laws of the flag nation, the petitioning American union would have been ineligible to act as bargaining representative, so that the potential result of the Board-ordered election was an irreconcilable conflict with Honduran law and administrative orders. Applicable treaties between the

United States and Honduras, moreover, entrusted regulation of the internal affairs of Honduran vessels to Honduran authority. The government of Honduras officially protested the Board's action to the United States government, and many maritime nations supported that protest through *amicus* briefs to this Court.

The Court noted that any attempt to justify Labor Board jurisdiction through a balancing of contacts might require Board inquiry "into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well." 372 U.S., at 19. Reviewing the history of the NLRA in light of the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship" and the consequent "possibility of international discord" and retaliation, the Court could "find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag . . ." 372 U.S., at 20. Accordingly, held the Court, "We have concluded that the jurisdictional provisions of the Act do not extend to maritime operations of foreign flagships employing alien seamen." 372 U.S., at 13.

On the basis of this decision, the Court, in the companion case of *Incres Steamship Co., Ltd.* v. *IMWU,* 372 U.S. 24, held the preemption doctrine inapplicable to a state court injunction against picketing by an American seamen's union "for the primary purpose of organizing foreign seamen on foreign flagships." 372 U.S., at 25. The picketing had induced foreign seamen to strike the vessel during the course of its voyage, in violation of their shipping articles.

B. The *Benz-Sociedad Nacional-Incres* Rule Has No Application to Labor Disputes In American Ports Involving Longshore, as Distinct from Maritime, Operations.

1. Longshore Work Does Not Involve the Ship's "Maritime Operations" or "Internal Affairs".

This Court has been precise in confining the area in which the Labor Board lacks jurisdiction to disputes involving the "maritime operations" or "internal affairs" of foreign flag vessels. Thus the critical portion of the *Benz* opinion refers to "labor disputes between nationals of other countries *operating ships* under foreign laws" (emphasis supplied). 353 U.S., at 143. And the holding of *Sociedad* is expressed in terms of the "maritime operations" of foreign flagships employing alien seamen. 372 U.S., at 13.

It is impossible to read these opinions without concluding that they rest upon the unique relationship between the vessel and its crew in the operation of the ship, the traditional seaman's craft. The key concept of "maritime operations" means the manning of the ship as it plies the seas from port to port. And the terms "internal discipline" and "internal affairs" likewise refer to the seagoing, shipboard relationship between master and crew.

This does not mean that a ship does not have "maritime operations" or "internal discipline" while in port. But it does establish readily discernible functional limitations on the crucial concept which lies at the root of the decisions relied upon below.

And while it is conceivable that there may be some job operations which approach the dividing line between longshore and maritime work—the handling of ship's lines in docking or undocking, or the removal and replacement of hatch covers preparatory to the loading or discharge of cargo or immediately upon its completion—these are no dif-

ferent from the usual factual issues that arise at the dividing line between any two disparate legal categories. Suffice it to say, no such issues arises in this case, for here the dispute relates to work which forms the very core of longshore operations, the loading of cargo, automobiles, baggage and ship's stores from dock to vessel.[5]

Unlike seamen, whose work is performed aboard ship and primarily away from port, the longshoremen's labor is performed exclusively in port and on the dock as well as on the ship. Its very essence is the transporting of physical materials from the dock to the ship and *vice versa*. To use the language of *Benz*, the longshoreman is never engaged in "operating ships". His short-term, irregular and casual relationship with the vessel does not involve the "internal discipline" of the ship as that term has evolved in the special *sui generis* body of law devoted to the relationship of ship's master and crew.

In short, the work of the longshoreman is functionally distinct from that of the sailor, and decisions expressly fashioned for one group because of its particular functional or relational characteristics have no applicability to the other.

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[5] In a case presenting a substantial factual issue as to whether the work related to maritime or longshore operations, we would urge that the decision must be made in the first instance by the Labor Board, and not by local courts. Any other result would permit local tribunals to circumvent Board jurisdiction by appropriate fashioning of factual findings. Compare *National Marine Engineers Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, holding that the threshold jurisdictional question of supervisory status is for the Board to determine.

2. Labor Board Jurisdiction Over the American Longshore Operations of Foreign Flag Vessels Has No Extraterritorial Effect.

One of the principal objections to Board jurisdiction over foreign seamen's disputes was its broad extraterritorial effect. A Board representation certification, for example, would have applied throughout the world wherever the ship might sail, wherever its bargaining might be conducted, wherever its crew might be called upon to work. No matter how frequently a ship might call at American ports, the major portion of its time would be consumed on the high seas or in foreign ports, beyond American territorial waters. Thus if the Act were construed to apply to the labor disputes between foreign vessel and foreign crew, then the reach of American administrative regulation would extend not only to the high seas, or casual world-wide ports of call, but even to the ports of the flag nation itself. Absent specific evidence of legislative intent, the Court was unwilling to attribute such a sweeping reach to the provisions of the NLRA.

Confirmation of Board jurisdiction over the American longshore labor disputes of foreign shipowners, on the other hand, has no extraterritorial effect. Longshoremen do not go to sea or work beyond American territorial jurisdiction. Petitioner is concerned about the longshore wages and conditions in American ports. "Area standards" picketing is limited, in the nature of the case, to work performed in the same area in which the American picketing union has established its contract standards. We are urging here simply the application of the national labor law to longshore labor disputes in American ports irrespective of the ship's registry; we are not urging the extension of Labor Board jurisdiction to longshore disputes in non-American ports.

3. Labor Board Jurisdiction Herein Would Not Conflict With the Labor Laws or Administrative Regulations of the Flag Nation.

Another principal consideration underlying *Benz, Sociedad Nacional,* and *Incres* was the inevitable collision between Labor Board jurisdiction and the laws of the nation of registry. In *Sociedad Nacional,* for example, a Honduran seamen's union had long been certified by Honduran authorities as crew's exclusive bargaining agent. Certification of any other union by the NLRB would have led to irreconcilable conflict. Moreover, an American union, under Honduran law, would be ineligible to represent Honduran seamen aboard Honduran ships. Again the two systems of regulation would have collided. Given the respect normally accorded the law of the flag, the delicacy of the international problems, the very real danger of retaliation, and the usual preference for a legislative construction in accordance with the law of nations, the Court declined to sanction a conflict with the laws and regulations of other maritime powers.

No such considerations exist here. No foreign law governs the performance of longshore work in American ports. Labor Board jurisdiction could not lead to the displacement of a foreign crew or foreign bargaining representative by an American crew or American union. It could not invite retaliation, since every foreign nation, including the nation of registry, would remain free to regulate longshore operations within its own borders. With no risk of collision, the labor laws of the several nations at which a vessel might call would continue to co-exist, as they have in the past. Seagoing labor relations or "maritime operations" would be governed by the law of the flag and longshore labor relations by the law of the nation having territorial jurisdiction.

4. Labor Board Jurisdiction Would Not Conflict With International Treaties.

The United States has bi-lateral treaties with many maritime nations confirming the flag status of vessels registered respectively by each of the contracting parties. In many instances these treaties also preserve the flag nation's jurisdiction over the internal discipline and affairs of its registered ships. In *Sociedad Nacional*, the Court adverted to these treaties as an additional reason why international complications would result from Labor Board jurisdiction over foreign maritime operations.

Because longshore work is performed exclusively in port, off the ship as well as on the ship, and usually by local employees, a labor dispute over wage rates for longshore work in American ports cannot be considered part of the internal discipline or internal affairs of a vessel and has not historically been so regarded. Thus Labor Board jurisdiction over such disputes does not imperil treaty commitments or derogate from the sovereignty of the flag of registry. The very fact that the Labor Board has consistently exercised both representation and unfair labor practice jurisdiction over longshore labor relations of foreign flag vessels (*infra*, pp. 28-30) without protest from any foreign government is ample practical evidence of this.

5. Labor Board Jurisdiction Herein Would Not Stimulate Foreign Vessels to Transfer Their Registry From Nations Now Sympathetic to Possible United States Emergency Needs.

In *Sociedad Nacional* and *Incres*, the Department of Justice, in opposing Labor Board jurisdiction, conveyed to the Court the fears of the Department of Defense that a decision upholding such jurisdiction might impel foreign flag vessels to transfer their registry, to the detriment of

the United States' defense posture. The large number of American-controlled vessels registered under "flags of convenience" in such countries as Panama, Liberia, and Honduras, were felt to be subject to United States Government call in the event of national emergency.[6] The Defense Department feared that if foreign crews were to become subject to American labor contracts, then a major motive for "flags of convenience" would disappear, and the vessels might then be transferred to the registry of other maritime nations under arrangements which would not only insulate them from American labor standards but would also eliminate their ready availability to this country in time of emergency.

This consideration, too, has no applicability to longshore disputes in American ports. For these disputes do not involve either the potential displacement of a foreign crew or the inclusion of foreign seamen within the collective agreements of American maritime unions. The minimal effect of paying American longshore rates for American longshore work does not have the far-reaching consequences expressed to this Court in *Sociedad Nacional*, any more than does the payment of the going price for ship's supplies purchased in this country.

6. The "Law of the Flag" Has No Application to the Regulation of Longshore Labor Disputes Exclusively Within the Territory of Another Nation.

Whatever vitality the law of the flag may have for the regulation of "the internal order and discipline of the ves-

[6] See, United States Department of Commerce, Maritime Administration, "Oceangoing Foreign Flag Merchant Type Ships of 1,000 Gross Tons and Over Owned by United States Parent Companies, as of December 31, 1968," Report No. Mar. 560-22, and United States Department of Commerce, Maritime Administration, "An Analysis of the Ships Under 'Effective U.S. Control' and Their Employment in U.S. Foreign Trade During 1960" (Marit. Adm. Office of Ship Statistics 1962).

sel and her 'occupants'" (Colombos, *International Law of the Sea*, (6th Ed. 1967), p. 324), it is plain that the loading and unloading of ships falls without its ambit.

The law of the flag represents a narrow exception to general principles of jurisdiction. It is not a Constitutional restriction, but a rule of construction in interpreting legislation, and a self-imposed limitation in developing judge-made law. Constitutionally, the United States retains total jurisdiction over all persons and things within its territorial boundaries, including foreign merchant ships coming into American ports for purposes of trade. As the Court held in *Cunard SS. Co.* v. *Mellon*, 262 U. S. 124:

> "A merchant ship of one country voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence just as with other objects within these limits."

To the same effect, see *Marine Cooks & Stewards* v. *Panama Steamship Co., Ltd.*, 362 U. S. 365; *United States* v. *Diekelman*, 92 U. S. 520; *The Belgenland*, 114 U. S. 355; *Wilderhus' Case*, 120 U. S. 1; *Uravic* v. *Jarka Co.*, 282 U. S. 234.

The law of the flag developed as a pragmatic expedient, necessitated by the continuing movement of ships from one territorial jurisdiction to another. Inasmuch as the ship maintained certain continuing relationships throughout the voyage, it would be impractical and disruptive if the rights and duties springing from these relationships were to vary with the laws of a particular port of call. As the Court observed in *Lauritzen* v. *Larsen*, 345 U. S. 571, 581:

> "The virtue and utility of seaborne commerce lies in its frequent and important contacts with more than one country. If to serve some immediate interest, the

courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."

The purpose of the rule demonstrates its limitation. Where a transaction or relationship is not "internal" to the ship, but involves substantial shore-based contacts, then the territorial jurisdiction must assert itself. Thus, for example, if shipboard events "involve the peace and dignity of the country or the tranquility of the port" then the law of the flag gives way. *Wilderhus' Case*, 120 U. S. 1, 11; *The Exchange*, 7 Cranch 116, 144; *Patterson* v. *The Endora*, 190 U. S. 169. Particularly is this so when the transaction is transitory and does not encompass relationships, standards of conduct, rights or duties that continue to affect the vessel on its voyage from port to port.

This is the case with longshore operations and longshore labor disputes. The work is as intimately connected with the shore as with the ship, and it continues, so far as the ship is concerned, only while the ship remains in port. Hence there is no risk that differing local laws will be applied to the same relationship or transaction. The pragmatic justification for legislative abstention from usual regulatory coverage simply does not exist.

Unlike the seaman who derives his protection and benefits from the law of the flag, the longshoreman would be remediless were the American territorial jurisdiction to be denied. While foreign safety, social welfare and other employee benefit laws may protect the seaman aboard a foreign flag vessel, they do not extend to American longshore operations.[7]

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[7] In *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F.2d 222 (2d Cir.), *affd.* sub nom. *McCulloch* v. *Sociedad Nacional de*

For these reasons both courts and legislatures have long recognized the basic distinction between seamen and longshoremen in determining the scope of the law of the flag. In *Uravic* v. *Jarka Co.*, 282 U.S. 234, a unanimous Court sustained a longshoreman's right of suit under the Jones Act (46 U.S.C. §688) for injuries incurred aboard a foreign vessel in an American port. In *Romero* v. *International Operating Co.*, 358 U.S. 354, on the other hand, a foreign seaman injured aboard a foreign flag vessel in New York harbor was denied recovery under the very same Act and was relegated to his rights under the laws of the flag nation.

Similarly, foreign shipping lines are compelled to cover their longshore employees in American ports under federal social welfare legislation. For example, longshoremen working foreign flag ships are entitled to the benefits of the Fair Labor Standards Act (29 U.S.C. §§ 201-219), *McCarthy* v. *Wright & Cobb*, 163 F. 2d 92 (2d Cir.); *Knudson* v. *Lee & Simmons, Inc.*, 163 F. 2d 95 (2d Cir.); Department of Labor, Wage and Hour Division, "Interpretive Bulletin", Part 783, C. F. R.; while seamen on the very same foreign vessels are expressly excluded. 29 U. S. C. § 213(a)(14). Similarly, longshoremen working "within the United States" on foreign flag vessels are covered by the Federal Old-Age, Survivors and Disability Insurance Benefits provisions of the Social Security Act. 42 U.S.C. § 410(a) (A) (i). Foreign seamen, working on the same foreign flag vessels, are specifically excluded from coverage. 42 U.S.C. § 410(a) (B) (4).

Marineros de Honduras, 372 U.S. 10, Judge Friendly observed that even if the NLRA were accorded the broadest sweep, it would not apply to longshore operations on Empresa ships in Honduran ports. On the same principle of territorial limitation, foreign laws, both labor and social welfare, do not apply to longshore operations in American ports.

As we shall show below (infra pp. 28-30), the same principle has been consistently observed in the application of the National Labor Relations Act.

7. The Fact That a Portion of Respondents' American Longshore Work Is Performed by Members of the Crew Does Not Deprive the Labor Board of Jurisdiction.

The longshore work for respondents' vessels, while in Florida ports, is accomplished partly by the ship's crew and partly by local residents hired for the occasion (A. 45a). The fact that American residents perform at least a portion of the work which occasioned the picketing simply confirms the Labor Board's exclusive jurisdiction, although the result would be the same even if this were not the case.

The record does not disclose the relative numbers of American and foreign workers or the way in which they combined to service the vessel's longshore needs. But this is not, in any event, an issue for a state court to explore. Even if it be assumed *arguendo* that seamen doing longshore work are excluded from NLRA coverage, their combination with American residents creates an issue for Labor Board determination. In order to effectuate the policies of the NLRA, in a single dispute involving some employees arguably subject to the Act and some arguably excluded, the Board must be given the opportunity to make the initial decision. For only the Board is statutorily qualified to evaluate the respective roles of the two groups of employees, to assess the weight to be given the particular factual pattern of combination, and to determine the legal significance of the facts found. Cf. *National Marine Engineers Ass'n.* v. *Interlake Steamship Co.*, 370 U. S. 173.

But even if the evidence were quite different and all of respondents' American longshore work were performed by

members of the ship's crew, the Labor Board would still have exclusive jurisdiction.[8] For seamen performing longshore labor must be distinguished from seamen performing seamen's work. Otherwise the purpose of the national Act would be readily and fundamentally thwarted in an industry crucial to American foreign commerce.

As indicated above, this Court has narrowly limited the area in which the Labor Board lacks jurisdiction to the vessel's "maritime operations", that is the work of men engaged in "operating ships". *Sociedad Nacional, supra; Benz* v. *Compania Naviera Hidalgo, supra.* If, however, the same individuals who comprise the ship's crew cast aside their seaman's role and undertake the tasks of another distinct, established trade—tasks, moreover, necessarily performed on dock as well as aboard ship—then the immunity from Board jurisdiction ceases. For then the interest of the territorial jurisdiction in assuring the resolution of labor disputes in accordance with its own laws emerges irresistibly, and the interest of the flag nation in maintaining its authority disappears. No nation can extend immunity from its regulatory legislation to seamen who are no longer acting as such but are doing shore-oriented work which necessarily affects the labor relations and labor tranquility of the port.

The longshoreman, it must be recalled, is not an American industrial creation. Longshoremen form a recognized trade or craft in all maritime nations throughout the world. International conventions, and reports by such world bodies

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[8] The Florida District Court of Appeal did not rest its decision upon the fact that crew members were performing a portion of the protested work. Indeed, that Court apparently viewed the picketing as a protest against the employment of "American residents" at substandard longshore rates (A. 52a). Nevertheless, on the sole ground that the employer was a foreign shipowner, the defense of exclusive Labor Board jurisdiction was rejected.

as the International Labour Office, are regularly devoted to longshore work and the longshore industry.[9] The distinction between seamen's work and longshore work is well known everywhere.

If foreign seamen could perform longshore work without coming under Labor Board jurisdiction, then they could move miles inland to obtain and transport ships supplies, and in so doing perform with equal impunity the work of a warehouseman, retail clerk, butcher, teamster, and perhaps a score of other trades. Presumably the shipowner could have the ship's repair work also done by crew members while the vessel lies in an American port. Indeed, during a lengthy stay, he might even assign to them other industrial shoreside tasks, so as to obtain the maximum economic benefit from their services while the ship is idle. The width of the swath which would thus be cut through traditional labor jurisdiction would be limited only by the resources and ingenuity of the foreign shipowner. And the inevitable threat—indeed the virtual certainty—of labor strife is too plain for argument.

Given an Act expressly designed to regulate activities which lead to "industrial strife or unrest" having the "effect of burdening or obstructing commerce" (29 U.S.C. § 151), it would be unthinkable for the national labor law not to apply in such circumstances. Nothing in the decisions of this Court, or the language, purpose or history of the Act, leads to any such mischievous and self-defeating a result.

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[9] *E.g., The International Labour Code, 1951* (ILO 1952), "The Protection Against Accidents of Workers Employed in Loading or Unloading Ships," Articles 587-609. Longshoremen are there referred to as "dockers". See, also, Dawson, "The Stabilisation of Dock Workers' Earnings" 63 *International Labour Review* 241-265.

C. The Labor Board, With Judicial Approval, Has Consistently Taken Jurisdiction Over the Longshore Labor Disputes of Foreign Flag Vessels.

Both before and after the decisions in *Benz, Sociedad Nacional* and *Incres*, the National Labor Relations Board has assumed jurisdiction over the American longshore operations of foreign flag vessels, both as to representation elections and unfair labor practice charges.

When establishing a port-wide appropriate bargaining unit, the NLRB has set a single unit for the longshore employees of all shipping companies, foreign and domestic alike. The presently effective NLRB certification for longshoremen in the Port of New York is set forth in *New York Shipping Association, Inc.*, 116 NLRB 1183. Among the employers included in that single Port-wide bargaining unit are such well-known foreign flag lines as Argentine State Line, Belgian Line, Inc., Chilean Line, The Cunard Steamship Company, Ltd., French Line, Hellenic Lines, Ltd., Holland-American Line, Italian Line, and Royal Netherlands Steamship Company (116 NLRB, at 1189-1190). Other representation proceedings involving pierside operations of foreign flag lines are *Compagnie Generale Transatlantique (French Line)*, 117 NLRB 535 and *Italia Societa per Azione di Navigazione (Italian Line)*, 118 NLRB 1113.[10]

The Labor Board has also consistently taken jurisdiction over unfair labor practice charges involving longshore op-

[10] Although many shipping companies have their American longshore operations performed by stevedoring contractors, some companies, including foreign flag lines, employ longshoremen, checkers, tally clerks, and similar workers directly, and they have always heretofore been considered subject to NLRB jurisdiction. The record herein does not show whether or not respondent operated through a local stevedore, but this, we urge, is immaterial, since NLRB jurisdiction applies in either event.

erations on foreign flag vessels, and those Courts of Appeal called upon to review Board action have uniformly confirmed the Board's jurisdiction. E.g. *Local 1355, ILA (Maryland Ship Ceiling Co.)*, 146 NLRB 723, *enf. den'd*, 332 F. 2d 992 (4th Cir.); *Cunard Steamship Co., Ltd.* Case Nos. 4-CA-1787, 1788, 4-CB-482, 4-CA-2229-1-2-3, 1961 CCH NLRB Decisions ¶10,813; *Madden* v. *Grain Elevator Workers Local 418*, 334 F. 2d 1014 (7th Cir.), *cert. den'd*, 379 U.S. 967; *Grain Elevator Workers Local 418* v. *NLRB*, 376 F. 2d 774 (D. C. Cir.), *cert. den'd*, 389 U.S. 932.

In one of the two consolidated cases decided by the Court *sub nom Sociedad Nacional, supra*, the Second Circuit, at the instance of the Honduran shipowner, had enjoined the Board-ordered representation election. *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222 (2d Cir.). Holding the Act and its procedure inapplicable to seamen, Judge Friendly noted the crucial distinction between longshoremen and sailors:

> "The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return."

The jurisdictional question was squarely raised in *NLRB* v. *Longshoremen's Local 1355, supra*, 332 F. 2d 992. Although the Board's order was denied enforcement on the merits, its jurisdiction over foreign vessel longshore disputes was upheld. Said the Fourth Circuit, in language directly in point herein:

> "The union has argued that the Board lacks jurisdiction over the subject matter. It is said first that because the "Tulse Hill" is a foreign-flag vessel manned by an alien crew and because her owner, Ocean, seeks to

invoke the Board's aid, this controversy is not one "affecting commerce" within the meaning of the Act. We do not accept this broad proposition. In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres S.S. Co.* v. *International Maritime Workers*, 372 U.S. 24 (1963); and *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), the cases relied upon for this purpose by ILA, the Supreme Court declared the Board without jurisdiction over labor relations between owners of foreign-flag vessels and their foreign crews. These cases all relate to shipboard labor relations, something very different from the present case."

D. Denial of Board Jurisdiction Over the Longshore Operations of Foreign Flag Ships Would Have Far-Reaching Disruptive Effects Upon Longshore Labor Relations.

Since the organization of American longshoremen into unions over fifty years ago, labor relations in the longshore industry have never depended upon the registry of the vessel. The same collective bargaining agreement covers all American longshore operations on both foreign and domestic ships. The employer associations which conduct longshore labor relations in this country (see *United States* v. *ILA, et al.*, 293 F.Supp. 97, 98)[11] consist of both foreign and domestic lines. The same longshoreman may work one day for a domestic line and the next day for a foreign line. His pension, welfare and vacation eligibility credits are accumulated through work under the collective bargaining agreement on behalf of ships flying the flags of all nations.

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[11] See also *United States* v. *ILA, et al.*, 116 F.Supp. 255, 259 (S.D.N.Y.); *United States* v. *ILA, et al.*, 147 F.Supp. 425 (S.D. N.Y.); *United States* v. *ILA, et al.*, 246 F.Supp. 849 (S.D.N.Y.).

Indeed, the great bulk of American foreign commerce—now over 94%[12]—is carried in foreign bottoms and the bulk of longshore work is performed on foreign ships.

Because of the difficulty in providing economic security for a work force in an essentially casual industry with little continuity of employment, longshore labor relations are difficult enough without added complications. Yet stable relations in this industry are crucial to the national economy, as is evidenced by the fact that the longshore industry has been subject to more "national emergency" injunctions under the Taft-Hartley Act than any other industry in the nation.[13]

The holding of the Florida courts would, in effect, bifurcate labor relations in this complex, sensitive branch of the economy. A portion of an industry which has traditionally been treated as an entity would be governed by the federal labor law with its single, authoritative, expert tribunal. Another portion—the major portion at that—would be subject to the laws of the various states and their respective tribunals.

The effects of this would work both ways. To take but a single recent example, a national longshore strike early in 1969 was ended through temporary injunctions obtained by the Labor Board against alleged union unfair labor practices in certain leading ports.[14] If the Board had lacked jurisdiction over foreign flag longshore operations, the con-

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[12] *The New York Times,* October 12, 1969, p. 1, col. 7; United States Department of Comemrce, Maritime Administration, "An Analysis of the Ships under 'Effective U.S. Control' and Their Employment in U.S. Foreign Trade During 1960," Table 2.

[13] See United States Dept. of Labor, Bureau of Labor Statistics, "National Emergency Disputes under the Labor Management Relations (Taft-Hartley) Act, 1947-62," BLS Report No. 169; and cases in footnote 11, *supra.*

[14] *Danielson* v. *ILA,* 59 CCH Labor Cases ¶13,261 (S.D.N.Y.).

sequences might have been entirely different. And it is undoubtedly because of their desire to obtain the benefits of the uniform federal law that foreign flag lines have not sought to escape the coverage of the NLRA.

In other instances, under the rationale below, the union, as charging party, would be deprived of the benefits of NLRB unfair labor practice jurisdiction or would be unable to avail itself of the Board's representation procedures. And in lawsuits instituted in state courts, such as the case at bar, longshoremen and their union would be deprived of the protection of federal law and the uniform application of that law by the prescribed federal agency. It was precisely to avoid such results that a single uniform federal act was adopted by Congress.

II.

In the Absence of Any Evidence, Finding or Judicial Articulation of an Illegal Objective, Prohibition of Peaceful Picketing to Publicize Substandard Wages Deprives the Union of Freedom of Speech.

"We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment." *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 313. The Court there summarized those cases upholding State prohibition of peaceful picketing as having "involved picketing that was found either to have been directed at an illegal end [citing cases] . . . or to have been directed to coercing a decision by an employer which, although itself legal, could validly be required by the State to be left to the employer's free choice." 391 U.S. at 314.

That the picketing herein was peaceful is undisputed. There is no claim, no evidence, and no finding of any physical impediment, actual or threatened, to the free passage of persons or materials.

Nor is there any claim, evidence, finding or other judicial explication of any illegal objective or purpose to petitioner's area standards picketing. Indeed, although this Court has held that the validity of a State's proscription of a particular union objective remains open to federal judicial scrutiny, here the question of validity need not and cannot be reached, for no state court has indicated what objectionable purpose existed or what state policy or law the picketing offended.

The sole witness, the union's president, testified that the picket signs publicized the payment of substandard wages for longshore work. There was no evidence, and no finding by any state court, that the picketing had secondary objectives or effects, or that it was designed to coerce either the employees in their choice of representative or the employer in his selection of employees. Nor was any other potentially prohibitable purpose brought out either at the hearing or in any judicial opinion.

The decisions of this Court make abundantly clear that such a record is wholly insufficient to sustain an injunction against peaceful picketing.

In *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, the state policy against antitrade restraint was expressed in statutory form, and the state court had found the picketing to be "an essential and inescapable part of a course of conduct" in violation of that statute. 336 U.S. at 491. Similarly in *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, the picketing offended the secondary boycott ban embodied in the state's antitrust laws, and this Court, after reviewing the evidence and findings, affirmed.

Although a state may proscribe particular picketing objectives through judicial as well as legislative action, *Hughes* v. *Superior Court*, 339 U.S. 460, this Court has insisted that the state court explicate the policy deemed to control the case, so that its applicability to the facts in the record and its validity as a basis for abridging communication can be federally reviewed. Any other course would have left precious federal Constitutional rights to the mercy of a potentially hostile tribunal and stripped this Court of its power to protect against arbitrary, unjustified abridgement.

Thus in *Teamsters Local 309* v. *Hanke*, 339 U.S. 470, the Court carefully examined the applicable state policy against compelling self-employer unionization and measured it against the Constitutional protection due picketing. Said the Court: "[W]e cannot conclude that Washington, in holding the picketing in this case to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice" 339 at 478-479. However, the Court stressed that "a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." In order to permit effective, meaningful review of the validity of the state's prohibition of particular union objectives, the Court emphasized that the state must "declare" its policy so that there would be a "defined unlawful object" 339 U.S. at 479-480. Similarly in *Building Service Employees, Local 262* v. *Gazzam*, 339 U.S. 532, 538, the Court noted that the state's policy against the proscribed purpose had been clearly "enunciated" and "declared", both by statute and in the opinion of the state court.

Just as *Hanke* and *Gazzam* stand for the proposition that the state must articulate and define its policy proscribing a particular union objective, so *Local 10, Plumbers Union* v. *Graham*, 345 U.S. 192 stands for the correlative proposition that the evidence in the record must support the conclusion that the picketing was in fact directed at the prohibited purpose. Said the Court (345 U.S. at 197):

> "In a case of this kind, we are justified in searching the record to determine whether the crucial finding by the state courts had a reasonable basis in the evidence."

The *Graham* opinion (345 U.S. at 197, footnote 4) quoted approvingly from *Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 293, 294, also a picketing case, as follows:

> ". . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. . . ."

In *Teamsters, Local 695* v. *Vogt, Inc.*, 354 U.S. 284, 294-295, the Court cautioned:

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing."

Measured against these standards, the record herein is totally inadequate to sustain the injunction. The trial court made no factual findings and nowhere defined or enunciated any state policy which would warrant prohibition of

petitioner's peaceful picketing. The unexplained conclusion accompanying both the oral and written temporary restraining orders, that the union's acts "are in violation of Florida law" (A. 16a; 46a) is patently insufficient. The purport of the "Florida law" remains wholly unexpressed and undefined, as does the supposedly offending union objective.

It should not be necessary—and under this Court's decisions it is not—for a union at the ultimate stage of litigation to have to guess at the basis for a state court injunction against peaceful picketing. Yet even if we indulge in this type of speculation, it is still apparent that the decisions below cannot pass Constitutional muster.

The only evidence in the record tends to show that the purpose of the picketing was precisely what appeared from the face of the signs themselves: to inform the public, and particularly the ship's passengers, or potential passengers, of the payment of substandard wage rates for longshore work. Indeed, this was apparently the view of plaintiff's attorneys who complained that "inducing customers to cease doing business with the plaintiffs, that is illegal—was illegal. And that is what we are asking this Court to enjoin" (A. 42a-43a). The fourth decretal provision of the injunction prohibiting picketing or handbilling to induce customers and potential customers to cease patronizing respondents' cruises indicates that the court regarded this as the gravamen of the wrong.

We need not belabor the point that discouraging consumer patronage of a business by reason of its disfavored labor policy is the classic objective of Constitutionally protected peaceful picketing. This was the precise objective of the picketing unions in the leading cases invalidating state injunctions on free speech grounds, from *Thornhill* v. *Alabama*, 310 U.S. 88 to *Logan Valley, supra*, 391 U.S. 308.

There are indications in the opinion below that the District Court of Appeal believed "that no real dispute over wages really existed" (A. 53a) because "none of the members in the appellant labor union are employed to perform any work in connection with the operation of the cruise ships involved herein" (A. 50a) and "therefore, publicizing accusations as to that grievance was also forbidden" (A. 53a). Compare *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270, reversing on preemption grounds a Florida injunction against stranger organizational picketing. It was just this type of state policy proscribing "picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute", which the Court condemned in *Teamsters Local 309* v. *Hanke, supra*, 339 U.S. 470.

A union is entitled to seek to eliminate substandard wages in the industry in which its members work, whether or not it represents the employees in a particular industrial establishment. *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, 106; *Mine Workers* v. *Pennington*, 381 U.S. 657, 666. Thus its Constitutional rights to discourage customers' patronage subsist even though it does not represent the employees currently performing the employer's work. *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza, supra*, 391 U.S. 308; *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769; *AFL* v. *Swing*, 312 U.S. 321. As the Court held in *Logan Valley*, 391 U.S. at 315:

> "[P]icketing of a business enterprise cannot be prohibited on the *sole* ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business."

Finally, a state court may not avoid the force of the constitutional protection merely by saying, or even finding, that

the picketing did not constitute a "labor dispute". There is no talismanic magic to this type of characterization. *Bakery Drivers Local 802* v. *Wohl, supra.*

That peaceful picketing is "free speech plus" does not deprive it of First Amendment protection "absent other factors involving the purpose or manner." *Logan Valley, supra,* 391 U.S. at 313. Here no such factors appear, and the picketing, therefore, falls squarely within the protected domain as defined by this Court.

CONCLUSION

For all the reasons stated, the judgment should be reversed and the case remanded with directions to modify the injunction so as to delete the three unnumbered decretal paragraphs and the injunctive paragraphs numbered "3" and "4" (A. 15a-16a).

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Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

National Labor Relations Act,
Sec. 7. (29 U.S.C. Sec. 157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain col-

lectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(b) (1), (2), (4) and (7) (29 U.S.C. Section 158 (b) (1), (2), (4) and (7))

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or

in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor

organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bar-

gain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Constitutional and Statutory Provisions Involved

Section 9(a) and (b) 29 U.S.C. Sec. 159(a) and (b))

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to

protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.